No. 86-1392

Supreme Court, U.S.
FILED
APR 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PHILADELPHIA FAST FOOD PARTNERSHIP
AND PHILADELPHIA FAST FOODS, INC.,
Petitioners,

v.

A. COPELAND ENTERPRISES, MARRIOTT CORPORATION, AND
POPEYES FAMOUS FRIED CHICKEN AND BISCUITS, INC.,
Respondents.

PHILADELPHIA FAST FOOD PARTNERSHIP
(NO. 1) AND PHILADELPHIA FAST FOODS, INC.
Petitioners,

v.

A. COPELAND ENTERPRISES, MARRIOTT CORPORATION, AND
POPEYES FAMOUS FRIED CHICKEN AND BISCUITS, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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JOINT BRIEF OF RESPONDENTS POPEYES, INC., A. COPELAND ENTERPRISES, INC. AND MARRIOTT CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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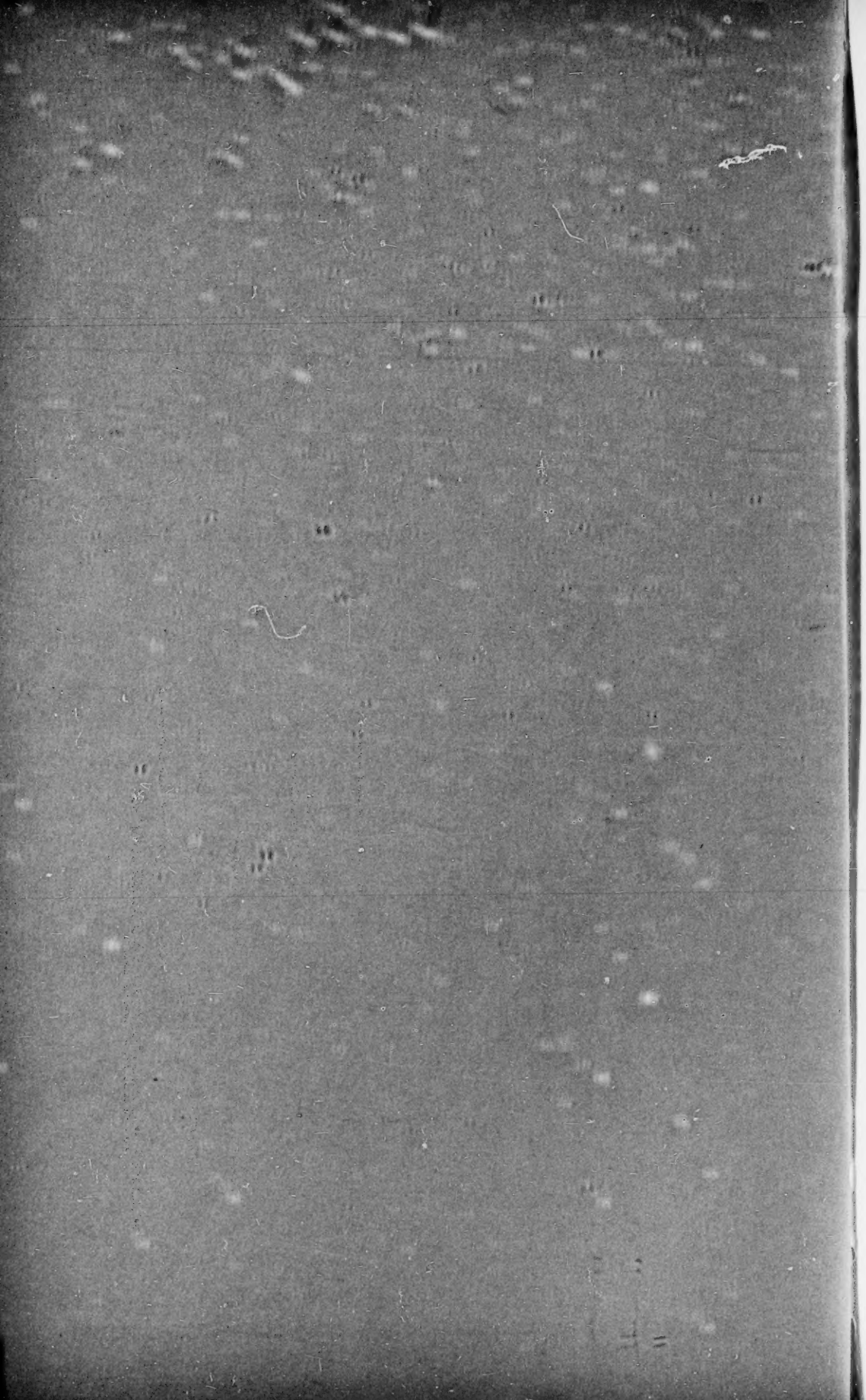

QUESTIONS PRESENTED

1. Whether the district court properly directed a verdict against petitioners on their claim that a franchisor's decision (based on non-price considerations) to grant exclusive development rights to one franchisee rather than another was *per se* unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Whether the issue of *per se* illegality under Section 1 of the Sherman Act was mooted by the jury's threshold finding on petitioners' "rule of reason" claim that no "conspiracy in restraint of trade" had been shown.

3. Whether petitioners are entitled to a new trial on their antitrust claims based on an estoppel instruction which was given in connection with a tortious interference with contract charge, where the jury rejected petitioners' antitrust claims for failure to show either a conspiracy or a relevant market (and thus would never have considered estoppel) and where petitioners have failed to preserve their objection to the instruction.

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Respondents Popeyes, Inc., A. Copeland Enterprises, Inc., and Marriott Corporation jointly request that this Court deny the petition for a writ of certiorari, which seeks reversal of the judgment of the United States Court of Appeals for the Third Circuit entered on November 26, 1986.[1]

Opinion Below

The United States Court of Appeals for the Third Circuit did not issue a published opinion, but issued a Judgment Order reported at 806 F.2d 253, 254 (3d Cir. 1986). The Third Circuit affirmed the decision of the United States District Court for the Eastern District of Pennsylvania denying petitioners' motion for judgment notwithstanding the verdict.

The opinion of the district court is not officially reported. The district court's opinion appears in the Appendix to the Petition ("Pet. App.") at A-1, and is unofficially reported at 1986-1 Trade Cas. (CCH) ¶ 67,120 (E.D. Pa. Mar. 13, 1986).

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[1] Popeyes, Inc. is the former corporate name of Popeyes Famous Fried Chicken and Biscuits, Inc. Popeyes, Inc. is wholly owned by A. Copeland Enterprises, Inc. Although named in the petition for certiorari, A. Copeland Enterprises, Inc. was dismissed by the district court below with agreement of counsel for petitioners. No evidence was presented as to A. Copeland Enterprises, Inc.; the jury made no findings with respect to A. Copeland Enterprises, Inc.; and petitioner raised no issues on appeal pertinent to A. Copeland Enterprises, Inc. A. Copeland Enterprises, Inc. has no parent corporations and no non-wholly owned subsidiaries. Popeyes, Inc. has no non-wholly owned subsidiaries. Marriott Corporation has seven non-wholly owned subsidiaries: Cedar Cave Corp., Hospitality Services, Inc., Win-beer, Inc., Sunshine Parkway Restaurants, Inc., Texas Host, Inc., Montana Food & Beverage Services, Inc., and Marriott-Portman Capital Corp.

Statutory Provisions Involved

15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Rule 51 of the Federal Rules of Civil Procedure provides:

> [n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

STATEMENT OF THE CASE

Respondent Popeyes, Inc. ("Popeyes") is a franchisor of fast food chicken restaurants which compete with numerous other restaurants in a wide variety of service formats. This case arises from Popeyes' efforts to develop restaurants in the highly competitive fast food market in Philadelphia, Pennsylvania. In order to develop rapidly and efficiently, Popeyes granted exclusive development rights to respondent Marriott Corporation ("Marriott"), an organization with resources and ability which had been demonstrated in a variety of successful operations throughout the world.

The petitioners, Philadelphia Fast Food Partnership and Philadelphia Fast Foods, Inc. (collectively "PFF"), own and operate one franchised Popeyes restaurant

in Philadelphia. In its amended complaint, PFF claimed that Popeyes' choice of Marriott, rather than PFF, to develop Popeyes' franchises in Philadelphia constituted three *per se* violations of Section 1 of the Sherman Act (PFF's claim is variously described as a "horizontal market allocation," a "group boycott," and a "concerted refusal to deal"), a violation of the rule of reason under Section 1 of the Sherman Act, attempted monopolization and a conspiracy to monopolize the market for "spicy fast food fried chicken" in Philadelphia under Section 2 of the Sherman Act, a breach of an informal contract, and tortious interference with contract and prospective business relations.

In its "Statement Of The Case," PFF principally offers conclusions without factual support in the record. Moreover, many of those conclusions were explicitly rejected by the jury. The facts, as presented at trial,[2] were as follows:

In October of 1982, PFF, through Charles Maxwell and his partners, entered into a standard Popeyes Option Agreement for one restaurant. The option was exercised, and PFF entered into a Franchise Agreement on December 16, 1982, for a restaurant at 139-143 West Chelton Avenue in Philadelphia.[3]

Later, Maxwell and Popeyes exchanged three letters dated March 24, 1983, April 1, 1983 and July 12, 1983, which PFF alleged at trial set out respectively an offer, an acceptance, and a breach of contract with respect to an option for an additional "yet

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[2] See district court opinion, Pet. App. at A4-12, A46-47.

[3] *See* Pet. App. at A8.

to be determined" five-store territory in Philadelphia.[4] The jury, however, rejected PFF's theory that Popeyes and PFF entered into a contract,[5] and PFF does not dispute that finding before this Court. In the July 12, 1983 letter to PFF, Popeyes withdrew from negotiations with PFF.[6]

Popeyes first discussed the possibility of selling franchise rights to Marriott in April of 1983, but reached no agreement with Marriott until December 8, 1983. There is no evidence that Marriott knew of PFF's claim to additional franchise rights, much less evidence that the July 12, 1983 letter to Maxwell was the result of an agreement between Popeyes and Marriott.[7] There is evidence, however, that before the

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[4] *See* Pet. App. A8-11.

[5] *See* Pet. App. A3.

[6] *See* Pet. App. at A10.

[7] *See* Pet. App. at A12. The only evidence to which PFF points to establish Marriott's knowledge is a handwritten notation on an April 27, 1983 letter from Popeyes to Marriott which states "1 store in line," as an explanation of how many franchise locations PFF had in Philadelphia. *See* April 27, 1983 letter from Popeyes to Marriott, Plaintiffs' Exhibit 57, Third Circuit Appendix (Vol. VII) p. 2614. (An "in line" store is a store located in a strip shopping center, as opposed to a free standing unit. *See* Testimony of William A. Copeland, III, May 7, 1985, Third Circuit Appendix (Vol. VI) p. 2181). PFF asserts that the note really says "7 store in line," even though the Marriott officer who wrote the "1" clearly testified that his "1" was in fact a "1." *See* Testimony of A. James Kline, Third Circuit Appendix (Vol. VI) pp. 2237-44; original April 27, 1983 letter from Popeyes to Marriott, Marriott Exhibit 11, Third Circuit Supp. Appendix (Vol. II) pp. 3844-45. Moreover, despite PFF's speculation (PFF Petition at 14-15), there is no evidence in the record as to what a "7" in this context could have referred.

execution of the December 8, 1983 agreement, Maxwell learned of the Marriott negotiations and actively encouraged Marriott to enter into an agreement with Popeyes.[8]

On December 8, 1983, Marriott's wholly-owned subsidiary, Mid-Atlantic Specialty Restaurants, Inc., entered a Popeyes Option Agreement granting it the exclusive right to develop Popeyes restaurants in the Philadelphia area except for PFF's one unit.[9] Popeyes used an exclusive development agreement because of the incentive it would give Marriott to develop the territory, and has regularly used such agreements in other parts of the country for the same reason.[10]

After the close of all of the evidence, the district court directed a verdict against PFF on its claims of *per se* violation of the Sherman Act. The jury then found against PFF on all of the remaining claims.[11] Following the jury's verdict, PFF filed a motion for judgment notwithstanding the verdict or for a new trial, claiming 132 points of error. In a detailed opinion, the district court denied PFF's motion. With respect to the questions presented before this Court, the district court refused to grant a new trial on

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[8] *See* Testimony of Charles Maxwell April 24, 1985, Third Circuit Appendix (Vol. III) p. 947.

[9] *See* Pet. App. at A12.

[10] *See id.*

[11] In answer to Special Interrogatories, the jury specifically found: (1) Popeyes and Marriott did not conspire to restrain trade; (2) PFF had failed to prove its purported relevant market; (3) Popeyes and PFF had no contract; and (4) Marriott did not tortiously interfere with PFF's actual or prospective contractual rights. *See* Pet. App. A2-A3.

PFF's claim of *per se* illegality under the antitrust laws because it found, applying *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), that a franchisor's (Popeyes') vertical grant of exclusive franchise development rights to one franchisee (Marriott), rather than another (PFF), was subject to the rule of reason, not the *per se* rule. The district court also found that the jury could not have found a *per se* Section 1 antitrust violation in light of its finding that there was no "conspiracy."[12]

The district court also rejected PFF's assertion that its antitrust claims were prejudiced by an instruction on estoppel later in the charge, holding that the jury was instructed that the estoppel charge applied to PFF's tortious interference claim, not its antitrust claims. The district court alternatively concluded that the jury could not in any event have applied the estoppel instruction to PFF's antitrust claims because the jury decided before reaching the issue of estoppel that PFF had failed to prove either a conspiracy or a relevant product market. Finally, the district court held that PFF had failed to preserve its right to object to the estoppel instruction because it did not object at trial that the wording of the estoppel instruction was ambiguous and could be inadvertently applied to the antitrust claims.[13]

PFF filed an appeal to the United States Court of Appeals for the Third Circuit, which affirmed the district court, and denied motions for rehearing and rehearing *en banc*. PFF then filed its petition for a writ of certiorari.

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[12] Pet. App. at A13-A38.

[13] Pet. App. at A75-A76 & n.21.

SUMMARY OF ARGUMENT

PFF has failed to advance any substantial reason that this Court should review the actions of the courts below in this matter. There is no conflict among the circuits as to the legal principles applied by the district court and the court of appeals in this case. There is no inconsistency between the court of appeals' action affirming the district court and the decisions of this Court. Nor has PFF suggested any other reason why this Court should re-examine the application of routine, well settled law.

PFF's initial contention—that Popeyes' grant of franchise rights to Marriott, rather than to PFF, is a *per se* unlawful horizontal market allocation or group boycott under Section 1 of the Sherman Act—was rejected below by both the district court and the jury. The action of each was proper and independently sufficient to preclude relief. *First*, the district court directed a verdict against the plaintiffs on their *per se* claim. The relevant and uncontested relationship between Popeyes and Marriott (the franchisor-franchisee relationship) is vertical, and the grant of exclusive territories has been recognized by this Court to have pro-competitive purposes and effects. Thus, the proper analysis of the facts presented was under the rule of reason, not the *per se* rule. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). *Second*, PFF failed to present sufficient evidence of a conspiracy to justify submission of its *per se* claim to the jury under the rule recently established by *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S. Ct. 1348 (1986). *Third*, following direction of a verdict on PFF's *per se* theory, the

same claim was sent to the jury under a "rule of reason" standard. The jury found that no agreement or conspiracy in restraint of trade had been shown, thus precluding any relief under a *per se* standard as well.

The other issue on which PFF seeks certiorari arises out of an estoppel instruction given to the jury in conjunction with a tortious interference with contract charge. This instruction did not misstate the law or mislead the jury into believing that the estoppel could apply to the antitrust claims. PFF's counsel were certainly not misled, and failed to raise this objection at trial. Moreover, the jury did not have occasion to apply this instruction to the antitrust claims, due to the jury's prior findings that PFF failed to prove either a conspiracy or a relevant market.

ARGUMENT

I. The Court of Appeals' Affirmance of The District Court's Directed Verdict Dismissing PFF's *Per Se* Claim Under Section 1 Of The Sherman Act Does Not Warrant This Court's Review.

A. The District Court's Ruling That A Franchisor's Grant Of An Exclusive Territory Is A Vertical Arrangement Subject To The Rule of Reason Is An Unexceptional Application Of Established Law.

Section 1 of the Sherman Act renders unlawful only those agreements which unreasonably restrict competition. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88, 690 (1978). In determining whether conduct unreasonably restricts competition, this Court employs two rules: the *per se* rule and the "rule of reason." The *per se* rule applies to agreements which experience has

shown are so plainly anticompetitive that they are illegal without further inquiry into their specific effect upon competition. Under the "rule of reason," agreements which may be pro-competitive are evaluated by examining their effects upon competition in a relevant market with both geographic and product dimensions. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court held that non-price vertical restraints are governed by the rule of reason.[14] In *Sylvania*, the Court examined a location clause establishing the physical site from which a distributor, Continental, could sell Sylvania products. There, this Court found (433 U.S. at 54):

> Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason.

Accordingly, this Court rejected application of the *per se* rule with respect to non-price vertical restraints. 433 U.S. at 57, 59. *Sylvania* stressed that it is primarily *inter*brand, and not *intra*brand, competition that the Sherman Act protects. 433 U.S. at 52 n.19.

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[14] A vertical restriction is a restriction placed by a manufacturer or franchisor on its dealers or franchisees. A horizontal restriction is a restriction agreed to by firms operating at the same level of the market structure, *e.g.*, an agreement among dealers or franchisees. *See, e.g., United States v. Sealy, Inc.*, 388 U.S. 350, 352-54 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972).

The Court reaffirmed this principle in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.6 (1984), stating that, with respect to vertical arrangements, "the holding of *Sylvania* [is] that non-price restrictions are to be judged under the rule of reason."

The conduct PFF attacks—Popeyes' alleged substitution of Marriott for PFF as Popeyes' franchisee at five undetermined Philadelphia locations and the grant of the remaining territory in Philadelphia to Marriott—is a classic vertical arrangement. As recognized in *Sylvania*, vertical territorial arrangements tend to promote interbrand competition by encouraging greater capital investment and advertising by the franchisee. 433 U.S. at 54-55.[15] Dismissal of PFF's *per se* claim was therefore proper.[16]

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[15] The uncontradicted testimony at trial was that Popeyes favors use of exclusive territorial development arrangements, and used such an arrangement in the Philadelphia market, because it gives franchisees "an incentive to go ahead and develop." Testimony of William A. Copeland, III, May 7, 1985, Third Circuit Appendix (Vol. VI) p. 2182. *See also* Pet. App. at A12.

[16] In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967), *overruled on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court stated:

> [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. (Citation omitted.) If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive

In asserting that there was a horizontal market allocation in this case, PFF simply misperceives the nature of horizontal and vertical relationships. Whether a market allocation is horizontal or vertical is determined by the relationship between the alleged conspirators—not the relationship between one alleged conspirator and the plaintiff. A horizontal market allocation is "*an agreement between competitors at the same level of the market structure* to allocate territories in order to minimize competition." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972) (emphasis added). Since the relationship between Popeyes (as franchisor) and Marriott (as franchisee) is vertical, there was no "horizontal market allocation" here.

Similarly, PFF's claim of a *per se* illegal group boycott or concerted refusal to deal is without merit because PFF has failed to show the concerted action by competitors which is necessary to state that claim. Indeed, this Court's decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), specifically distinguished a *per se* illegal group boycott from a manufacturer and a dealer agreeing to an exclusive distributorship. *See also White Motor Co. v. United States*, 372 U.S. 253 (1963); ABA Section, Antitrust Law Developments (Second) 40 (2d ed. 1984). The courts of appeals are in substantial agreement that a manufacturer's termination of one distributor and substitution of another distributor in the former's territory is not a *per se* unlawful boycott, even if the substitution were pursuant to an agreement with the

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products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

This aspect of *Schwinn* was consistent with, and reaffirmed by, the opinion in *Sylvania*.

new distributor. *See, e.g., Westman Commission Co. v. Hobart Intern., Inc.*, 796 F.2d 1216, 1223-24 (10th Cir. 1986); *Hennessy Industries, Inc. v. FMC Corp.*, 779 F.2d 402, 404 (7th Cir. 1985); *Carlson Machine Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253, 1259 (5th Cir. 1982); *Oreck Corp. v. Whirlpool Corp.*, 563 F.2d 54, 57-58 (2d Cir. 1977), *cert. denied*, 439 U.S. 946 (1978).[17]

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[17] PFF relies on two Third Circuit opinions, neither of which is applicable to this case. In *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), the Third Circuit held that the "horizontal effect" of an otherwise vertical arrangement between a single seller and a single buyer may be *per se* illegal where a price cutting dealer is terminated by a manufacturer pursuant to an agreement with the price-cutter's competitor in order to stifle price competition. The *Cernuto* court was solely concerned with the "price orientation of the alleged conspiracy" before it, and expressly distinguished a situation involving an exclusive franchise. 595 F.2d at 168-70. There is no allegation or evidence of record that there was any price motivation underlying Popeyes' refusal to grant PFF additional franchises, and PFF does not raise such an issue in its petition.

PFF also relies on *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 734 F.2d 133 (3d Cir.), *cert. denied*, ___ U.S. ___, 105 S. Ct. 564 (1984), to support its theory of a *per se* illegal group boycott composed of a single franchisor and a single franchisee. However, *Malley-Duff* involved a classic horizontal conspiracy in which the plaintiff "alleged an agreement among insurance sellers—. . . all competitors of Malley-Duff in the insurance sales business—who conspired among themselves, and indirectly assisted by Crown Life [another defendant vertically related], to freeze their competitive seller out of the Crown Life insurance market." 734 F.2d at 141. Thus, in *Malley-Duff*, there was a horizontal conspiracy comprised of two or more competitors at the same market level as the plaintiff, as required by established precedent of this Court.

Finally, on the facts of the present case, the Third Circuit affirmed the district court's decision to deny *per se* treatment to

In sum, the district court's direction of a verdict for the defendants with respect to PFF's *per se* theory, and the Third Circuit's affirmance of that decision, were correct and unexceptionable applications of well-settled legal principles established by this Court and recognized by the other courts of appeals.

B. The Direction Of A Verdict For The Defendants On PFF's *Per Se* Claim Was Proper Because PFF Failed To Produce Evidence Of A Conspiracy Sufficient, Under Recent Rulings Of This Court, To Allow The Claim To Go To The Jury.

After the trial of this case and the district court's decision denying PFF's post-trial motions, this Court decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S. Ct. 1348 (1986). Under *Matsushita*, the district court's direction of a verdict on PFF's *per se* claim was proper for the additional reason that PFF's evidence supporting its claim of "conspiracy" was critically deficient. As this Court stated (106 S. Ct. at 1360):

> we [have] emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-64 (1984)).

This Court explained (106 S. Ct. at 1356):

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petitioners' antitrust claim. Thus, whatever the viability of the theories advanced in *Cernuto* or *Malley-Duff*, the courts of appeals, including the Third Circuit, are in accord that *per se* treatment on the facts here would be improper.

> [I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

In the present case, common sense suggests that Popeyes did not have to "conspire" with anyone in order to prefer Marriott to PFF as a developer of franchised restaurants in the Philadelphia territory. The objective attractiveness of Marriott as a franchisee, Popeyes' unilateral policy of preferring exclusive territorial development arrangements, and PFF's inadequacies both as an operator and a developer of Popeyes units are all established by the evidence.[18] In addition, there was substantial evidence that Marriott was not aware of PFF's purported additional franchise rights. *See* Pet. App. at A12.

PFF offered no evidence tending to suggest that Popeyes' decision was not totally consistent with Popeyes' legitimate, independent business interests. PFF virtually concedes as much. At page 20-21 of its petition, PFF states:

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[18] The record shows that PFF ran an unsuccessful enterprise which initially misled Popeyes as to its financial abilities, consistently lost money, had sanitation problems, and was delinquent in making its royalty payments to Popeyes. *See* Testimony of William A. Copeland, III, Third Circuit Appendix (Vol. VI) pp. 2177-78, 2186-92; Testimony of Charles Maxwell, April 24, 1985, Third Circuit Appendix (Vol. III) pp. 879-86; Financial Statements of PFF, Popeyes' Exhibits 14, 15, Third Circuit Supp. Appendix (Vol. II) pp. 3814-43; May 2, 1983 memo from Tom Willard to Harold Summer, Popeyes' Exhibit 13, Third Circuit Supp. Appendix (Vol. II) pp. 3812-13.

> The evidence also indicates that Popeyes had business motivations to accede to the demands of Marriott which were founded primarily upon the attractive prospect of having a single franchisee with financial power and resources singlehandedly to develop a large number of franchises in the Philadelphia geographic market.

The inference arising from Marriott's objective strength as a potential interbrand competitor is that Popeyes, for legitimate, pro-competitive reasons, would independently decide to court Marriott, rather than PFF, to develop Philadelphia. 106 S. Ct. at 1356. Here, PFF presented no evidence, let alone "more persuasive evidence," that Popeyes' decision to break off negotiations with PFF and to continue negotiations with Marriott was not a proper, pro-competitive response to interbrand competition in Philadelphia. Thus, under *Matsushita*, the district court's direction of a verdict on PFF's *per se* claim was proper for the additional reason that PFF failed, in three weeks of trial, to "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, *supra*, 106 S. Ct. at 1357 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)).

C. The Jury Precluded Any Finding Of A Section 1 Offense In Finding That No Conspiracy To Restrain Trade Had Been Shown.

Although, at the close of all the evidence, the district court directed a verdict for Popeyes and Marriott with respect to PFF's claim of a *per se* violation of Section 1 of the Sherman Act, the court submitted the same claim to the jury under a "rule of reason"

standard. The threshhold issue with respect to any claim under Section 1 of the Sherman Act—whether the claim is governed by the *per se* rule or the rule of reason—is whether there was concerted action, *i.e.*, was there an agreement or conspiracy in restraint of trade. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

In answering the first special interrogatory, the jury found that Popeyes and Marriott did not agree or conspire to restrain trade. There was no objection to the district court's charge to the jury on what constitutes a conspiracy for antitrust purposes, nor is there any challenge in PFF's petition to the jury's finding that no conspiracy had been shown. In finding that there was no conspiracy or agreement with respect to PFF's rule of reason claim, the jury negated the possibility that any *per se* claim could have been shown. On that basis as well, PFF's challenge to the district court's direction of a verdict on PFF's *per se* claim must be rejected.

II. The Court of Appeals' Affirmance Of The District Court's Refusal To Grant A New Trial Based On The District Court's Estoppel Instruction Does Not Warrant This Court's Review.

None of the issues involving the trial court's estoppel instruction involve a conflict among the circuits or an application of law contrary to this Court's decisions. Rather, this issue simply involves the district court's reasonable interpretation of how the jury construed its charge.

Nowhere did the courts below decide or hold that an estoppel defense is applicable to the antitrust laws. Rather, PFF takes the district court's instruction regarding estoppel out of context, and complains that

the district court did not clearly specify to the jury that the estoppel defense was applicable only to the non-antitrust torts.[19] In fact, as the district court held, the estoppel instruction was delivered in conjunction with the portion of the charge dealing with PFF's claim of tortious interference with contract. This portion of the charge was much later than the Court's antitrust instructions, and the jury was never instructed that estoppel could bar PFF's antitrust claims.[20] Moreover, PFF did not object that the wording was either ambiguous or that the instruction should specify its inapplicability to the antitrust claims.[21] PFF simply objected generally to providing an estoppel instruction because it asserted (incorrectly) that Marriott's counsel did not raise this theory previously.[22] Under Rule 51, Fed. R. Civ. P., PFF has waived any right to object now.[23]

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[19] Marriott was entitled to an estoppel instruction because prior to Marriott's execution of its agreement with Popeyes, Maxwell, PFF's president, encouraged Marriott to enter into the Popeyes agreement. *See* Testimony of Charles Maxwell, April 24, 1985, Third Circuit Appendix (Vol. III) p. 947.

[20] *See* Pet. App. A75-76; May 9, 1985, Third Circuit Appendix (Vol. VII) pp. 2503-06.

[21] *See* Pet. App. A75-76; May 9, 1985, Third Circuit Appendix (Vol. VII) p. 2535; May 8, 1985, Third Circuit Appendix (Vol. VII) pp. 2446-47.

[22] Contrary to PFF's assertion at trial, Marriott did not raise the estoppel issue belatedly. Rather, it raised the issue in its Answer to PFF's Amended Complaint, filed over six months before trial. *See* Answer of Marriott Corporation to Plaintiff's Amended Complaint, Third Circuit Appendix (Vol. I) p. 74.

[23] The purpose of Rule 51 is to give the trial court a meaningful and informed opportunity to correct any errors before the jury begins its deliberations. "In fairness to the trial court and

Finally, as the district court correctly held in its opinion, the jury never reached the issue of estoppel with respect to the antitrust claims.[24] In its responses to the Special Interrogatories, the jury found that PFF failed to prove either a conspiracy or a relevant market.[25] Without proof of a conspiracy or a relevant market, PFF could establish neither a violation of Section 1 of the Sherman Act, nor a violation of Section 2 of the Sherman Act. Accordingly, the jury had no opportunity to apply the estoppel instruction to any antitrust issue.

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to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). A general objection stating no grounds is not sufficient. *See Sowizral v. Hughes*, 333 F.2d 829, 834 (3d Cir. 1964); *Bogacki v. American Machine & Foundry Co.*, 417 F.2d 400, 407 (3d Cir. 1969).

[24] *See* Pet. App. at A76.

[25] *See* Pet. App. at A2-A3.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

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Dated: April 1, 1987